IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "F", MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER

ITA No.5282/M/2016
Assessment Year: 2011-12

Late Shri Narottam G. Prabhu, By L.H. Vishwas Narottam Prabhu, 301, Simran Elegance, Tandon Road, Dombivili (E), Dist. Thane 421 201 **PAN: AAGPP3120Q**	Vs.	The Income Tax Officer, Ward 3(3), Kalyan
(Appellant)		(Respondent)

Present for:
Assessee by : Shri P. Daniel, A.R.
Revenue by : Ms. Pooja Swaroop, D.R.

Date of Hearing : 21.02.2018
Date of Pronouncement : 17.05.2018

O R D E R

Per Rajesh Kumar, Accountant Member:

The present appeal has been preferred by the assessee against the order dated 30.06.2016 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2011-12.

2. The assessee has raised the following grounds:

"1. The Learned C.I.T. (A) erred in confirming the disallowance of Rs.16,84,400/- out of Labour Charges u/s. 40(a)(ia) of the Incometax Act, 1961 and adding the same to his total income even though the provisions of Sec. 44AB were not applicable to the assessee during this year.

2. The Learned A.O. erred in not granting relief of Rs. 1,13,125/- under Chapter VI A of the Incometax Act, 1961.

3. The Learned CIT(A) erred in not deciding the charging of Interest u/s. 234A, 234B, 234C of the I. T. Act, 1961.

It is prayed that the additions made may please be deleted or in the alternative, the assessment be cancelled.

The appellant craves leave to adduce, add, amend, alter, or delete any of the above grounds of appeal before or at the time of hearing of this appeal."

3. The issue raised in ground No.1 is against the confirmation of Rs.16,84,400/- by Ld. CIT(A) as made by the AO out of labour charges for non deduction of tax under section 40(a)(ia) of the Act even though the provision of section 44AB were not applicable during the year under consideration.

4. The facts in brief are that the AO during the course of assessment proceedings observed that there is an increase in the closing work in progress over the opening work in progress to the tune of Rs.1,03,63,200/- and further noted that assessee has paid Rs.16,84,400/- to three parties towards labour charges on which no TDS has been deducted. Accordingly, a query was raised on the issue as to the non deduction of tax at source from the labour charges which was replied by the assessee vide letters dated 28.02.14 and 19.03.14 submitting therein that the assessee is an individual and individual/HUF is liable to deduct TDS at source if the turnover is in excess of a specified limit as provided under section 44AB of the Act. Since the assessee was not liable to get the accounts audited and therefore no TDS was deducted at source. The assessee further submitted that in the case of work in progress there is no buyer and accordingly the work in

progress can not be considered for the purpose of turnover as the same is only a cost of material, labour, other indirect expenses incurred by the assessee. It is the cost of incomplete work done by the assessee and akin to stock in trade, the ownership of which remains with the assessee. However, the submission of the assessee did not find favour with the AO and he added a sum of Rs.16,84,400/- under section 40(a)(ia) of the Act for non deduction of TDS at source by observing that assessee on his own got his account audited on the basis of WIP and filed audit report.

5. In the appellate proceedings, the Ld. CIT(A) confirmed the addition as made by the AO by observing that the assessee has done some work whereby adding a sum of Rs.1,03,63,200/- to the work in progress comprising cost of material, labour charges and also received advances from the buyers of the flats as per the agreements with the respective buyers which were shown in the balance sheet to the tune of Rs.4.53 crores the corresponding amount whereof in the immediately preceding year stood at Rs.3.12 crores. As per the Ld. CIT(A) the same constituted the gross receipts and since these receipts were in excess of the prescribed limit of Rs.40 lakhs under section 44AB, the assessee was required to get his account audited under section 44AB of the Act and also required to deduct tax at source.

6. The Ld. A.R. vehemently submitted before us that during the year though the assessee has received advances against sale of flats which were duly depicted in the balance sheet for

the year but there was no sale. The ld AR stated that it was only addition in the work in progress of Rs.1,03,63,200/- which comprised of cost of material, labour charges and other overheads. The Ld. A.R. submitted that since the assessee was not having the requisite turnover he was not liable to get his account audited under section 44AB of the Act. Resultantly, the assessee was not liable to deduct TDS at source from the labour payments as per the provision of section 194C of the Act. The Ld. A.R. submitted that the provisions of TDS in case an individual/HUF are applicable only if the turnover of the assessee is in excess of the limit as prescribed under section 44AB of the Act. The Ld. A.R. vehemently opposed the findings of the Ld. CIT(A) that the advances received from the customers and work in progress represented the turnover and the provisions of section 44AB of the Act were applicable as the limit prescribed under section 44AB of the Act has exceeded during the year. The Ld. A.R. relied on a series of decisions namely ACIT vs. B.K. Jhala & Associates (1999) 69 ITD 141 Pune, M/s. Siroya Developers vs. DCIT in ITA No.600/M/2010 A.Y. 2005-06 and Jacobs Engineering India Pvt. Ltd. vs. Addl. CIT in ITA No.1359/M/2008 A.Y. 2004-05. Finally, the Ld. A.R. submitted that in view of the ratio laid by the judicial forums , the claim of assessee should be allowed by directing the AO to delete the addition.

7. The Ld. D.R., on the other hand, relied on the order of Ld. CIT(A) particularly on para 14, 15 & 16 wherein the

decisions were relied upon by the A.R. were clearly distinguished and the issue was dismissed. The Ld. D.R. finally prayed that in view of these facts, the ground raised by the assessee should be dismissed.

8. We have heard the rival submissions of both the parties and perused the material on record. The facts are that the turnover of the assessee during the year was below the specified limit as prescribed under section 44AB of the Act whereas there was increase in the work in progress during the year to the extent of Rs.1,03,63,200/- over the opening work in progress on account of materials, labour charges and other overheads. The assessee has also received advances against sale of flats which were Rs.4.53 crore at the year end as compared to Rs.3.12 crore in the immediate preceding year. The controversy is that the AO disallowed labour charges to the tune of Rs.16,84,400/- from three parties under section 40(a)(ia) of the Act for non deduction of tax at source which the Ld. CIT(A) upheld by observing that the advances against sale of flats was part of the gross receipt and therefore the case of the assessee is covered under section 44AB of the Act. Consequently, the assessee was required to deduct tax under section 194C of the Act. The Ld. CIT(A) relied on the decision of Tribunal in the case of Esque Finmark Pvt. Ltd. vs. ACIT 9(1), Mumbai ITA/1624/Mum/2011 and DCIT vs. Gopal Krishan Builders (2004) 91 ITD 124 (Lucknow) SMC whereas the counsel relied on the decision of Tribunal in the case of ACIT vs. B.K. Jhala & Associates (1999) 69 ITD 141 Pune,

M/s. Siroya Developers vs. DCIT in ITA No.600/M/2010 A.Y. 2005-06. Thus, there is a clear dichotomy of ratios one in favour of the assessee and other against the assessee. We are also of the view that any advances received against sale of flats are not part of the gross turnover/receipts for the purpose of 44AB of the Act and therefore not to be accounted for the purpose of calculating the overall sales/turnover as prescribed by the provision of section 44AB of the Act. In the case of CIT vs. M/s. Vegetable Products Ltd. 88 ITR 192 the Hon'ble Apex Court has held that if two reasonable construction of taxing provisions are possible then construction which favours the assessee must be adopted. In view of the said ratio laid down by the Hon'ble Apex Court we set aside the order passed by the Ld. CIT(A) and allow the appeal of the assessee.

9. The second issue raised by the assessee is against non granting of relief to the tune of Rs.1,13,125/- under chapter VI A of the Income Tax Act, 1961.

10. Having heard both the parties and perused the material on record including the impugned order of the AO, we find that the assessee is entitled to deduction under chapter VI A of the Income Tax Act, however, as per the AO the assessee has not furnished the documents regarding the said claim. Now under the present circumstances, we are of the view that the matter should be restored to the file of AO so that the necessary verification of the evidences could be done and deduction be

allowed. Accordingly, we restore the issue to the file of AO with the direction to allow reasonable opportunity to the assessee to file the necessary evidences and decide the issue as per facts on law. The ground is allowed for statistical purpose.

11. In the result, the appeal of the assessee is partly allowed for statistical purpose.

Order pronounced in the open court on 17.05.2018.

Sd/-	**Sd/-**
(Saktijit Dey)	**(Rajesh Kumar)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai, Dated: 17.05.2018.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.